

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Mark Acton, Vice Chairman; and  
Robert G. Taub

Market Dominant Product Prices  
Inbound Market Dominant Multi-Service Agreements  
with Foreign Postal Operators  
Korea Post – United States Postal Service  
Bilateral Agreement (MC2010-35)  
Negotiated Service Agreement

Docket No. R2013-9

ORDER GRANTING, IN PART, MOTION  
FOR PARTIAL RECONSIDERATION OF ORDER NO. 1864  
AND MODIFYING, IN PART, ORDER NO. 1864

(Issued August 11, 2014)

I. INTRODUCTION

The Postal Service has moved for partial reconsideration of Order No. 1864.<sup>1</sup> It seeks deletion of ordering paragraph no. 7, which directed the Postal Service to address the appropriate baseline agreement and product designation for the market dominant Foreign Postal Operators 1 (MD FPO 1) grouping of contracts. It also seeks

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<sup>1</sup> See Motion for Partial Reconsideration of Order No. 1864, November 6, 2013 (Motion). The Motion includes a request that the underlying docket be reopened. Motion at 2. No responses to the Motion were filed. See *also* Order Approving an Additional Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (with Korea Post), October 30, 2013 (Order No. 1864).

inclusion of a directive consistent with the Postal Service's alternative proposal. For the reasons discussed below, the Commission grants the Motion in part.

## II. BACKGROUND

In joint Docket Nos. MC2010-35, R2010-5, and R2010-6, the Postal Service asked the Commission to approve the addition of Inbound Multi-Service Foreign Postal Operators 1 (MD FPO 1) to the market dominant product list and to include two agreements within the new product on the grounds that each agreement was functionally equivalent to the other.<sup>2</sup> In Order No. 549, the Commission approved these requests, but neither the text of the Order nor the accompanying Mail Classification Schedule (MCS) language explicitly identified one agreement, the other, or both, as baseline agreements for future functional equivalence comparisons.<sup>3</sup>

The lack of specificity in Order No. 549 on the identification of a baseline agreement has led to uncertainty in subsequent MD FPO 1 cases, and prompts the Postal Service's Motion.

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<sup>2</sup> See Docket Nos. MC2010-35, R2010-5, and R2010-6, Request of United States Postal Service to Add Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators to the Market-Dominant List, Notice of Type 2 Rate Adjustments, and Notice of Filing Two Functionally Equivalent Agreements (Under Seal), August 13, 2010 (Original Request).

<sup>3</sup> Docket Nos. MC2010-35, R2010-5, and R2010-6, Order Adding Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the Market Dominant Product List and Approving Included Agreements, September 30, 2010 (Order No. 549). The two included agreements are the Strategic Bilateral Agreement between the United States Postal Service and Koninklijke TNT Post BV and TNT Post PakketService Benelux BV (in Docket No. R2010-5) and the China Post Group–United States Postal Service Letter Post Bilateral Agreement (in Docket No. R2010-6).

Since the issuance of Order No. 549, functional equivalence comparisons have employed varying approaches to the identification of a baseline agreement in MD FPO 1 functional equivalence comparisons.<sup>4</sup> While this has not foreclosed consideration of new agreements proposed for inclusion within the MD FPO 1 product, it has resulted in inconsistencies and has not promoted the efficient evaluation of functional equivalence.

Prompted in part by the Public Representative's concerns about the need for clarity on the baseline issue in Order No. 1864, the Commission observed that the number of agreements included within the MD FPO 1 product has grown substantially since the product was introduced in 2010, and that the original two agreements have been superseded. Order No. 1864 at 7-8. The Commission recognized that this meant that identification of a baseline agreement for the MD FPO 1 product was not as straightforward as for more narrowly-defined products with fewer agreements. The Commission further clarified:

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<sup>4</sup> See, e.g., Docket No. R2011-4, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, January 31, 2011 (the first MD FPO 1 case filed following Order No. 549) where the Postal Service addressed contractual differences in terms of the new agreement (with HongKong Post) and the R2010-6 (China Post) Agreement; Docket No. R2011-7, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Equivalent Agreement, August 16, 2011 (the Postal Service addressed differences in a successor agreement with China Post in terms of the original R2010-6 (China Post) Agreement); Docket No. R2012-4, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, November 14, 2011 (the Postal Service addressed differences in a new agreement with HongKong Post in terms of the predecessor HongKong Post Agreement).

Since those [two original agreements] have been superseded, in its next filing concerning this (or successor) product, the Postal Service is to address the continued appropriateness of the reference in the MCS to the original agreements as baseline agreements and propose alternatives (if warranted). If an alternative is proposed, the Postal Service should file a request to establish a new product, e.g., Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 2, pursuant to 39 C.F.R. part 3020, subpart B. This result would be administratively preferable to continued reliance on the current product for future agreements.

*Id.* at 8.

Ordering paragraph no. 7 summarized this finding as follows: “The Postal Service is to address the baseline agreement and product designation in its next filing concerning this (or successor) product as discussed in the body of this Order.” *Id.* at 10.

### III. THE POSTAL SERVICE’S MOTION

The Postal Service’s Motion does not directly address the continued reference in the MCS to the two original (and expired) agreements. Instead, it raises a broader issue based on the implications of the concept of functional equivalence. Specifically, the Postal Service asserts that identification of a baseline agreement when proposing the addition of an agreement to a product grouping that already contains a number of functionally equivalent agreements need not be limited to a single agreement. Motion at 4. This assertion stems from the Postal Service’s perspective that:

The original agreement added to the competitive or market dominant products list within a classification by default is the baseline agreement to which the next agreement must be compared to determine whether there is a basis to consider them as functionally equivalent. Once an additional agreement is added to a product grouping as functionally equivalent to the original agreement in that grouping, it is considered on equal footing as an exemplar of the classification. It cannot be said that one of these

agreements is more or less functionally equivalent to the original baseline agreement. It can be said, however, that the terms of one agreement in the product grouping are more similar to those of another than to the original agreement.

*Id.*

Based on this reasoning, the Postal Service proposes an approach to identifying a baseline agreement in future MD FPO 1 cases that includes two alternatives.<sup>5</sup> When a new agreement is with the *same* foreign postal operator as an existing agreement, the existing agreement would be the baseline when the intention is to continue the basic conditions of the existing agreement for a new term, even when new products or services might be added. *Id.* The Postal Service's rationale for this approach is that if changes to the new (successor) agreement will have no effect on cost or market characteristics, finding that it is functionally equivalent to the existing (predecessor) agreement "would seem to make the exercise more efficient for all involved." *Id.* at 5. In cases where there is no predecessor agreement, the Postal Service proposes comparing the new agreement with existing agreements in the product, with a focus on the products included in the agreements. *Id.*

The Postal Service asserts there is no need to create a second iteration of the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators; that doing so would unnecessarily add to the MCS; and that new groupings for a set of upcoming bilateral instruments would simply introduce a measure of complexity that would serve no practical purpose. *Id.*

#### IV. COMMISSION ANALYSIS

The Postal Service's suggestion that future functional equivalence comparisons in MD FPO 1 cases be tailored to the circumstances presented in each case, based on

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<sup>5</sup> The Postal Service's first alternative moots the question of continued reliance on the two original agreements. The second option leaves open the possibility that one, the other, or both original agreements could be used in a functional equivalence comparison.

the existence (or absence) of an agreement with the same foreign postal operator has some positive elements. For example, determining whether there is an existing agreement with the same foreign operator is easy to ascertain and, in those cases, the scope of the comparison is relatively straightforward.

However, the Postal Service's proposal also has three significant drawbacks. First, where there is no existing agreement, the proposal to compare a new agreement to any number of "similar agreements" could lead to a question about the appropriateness of the selected agreements. This would not only unduly complicate consideration of the new agreement, but would also fail to address problems with past comparisons, where references to multiple agreements have added unnecessary complexity to the evaluation process. These possibilities defeat the Commission's interest in clarifying and simplifying identification of the baseline agreement discussed in Order No. 1864.

Second, the Postal Service's proposal raises administrative concerns with respect to listing agreements in the MCS. In particular, the Postal Service's approach does not seem consistent with the MCS's system for identification of baseline agreements. Currently, the MCS lists all baseline agreements so the Postal Service and the public know which agreements are the baseline agreements for comparison purposes for all negotiated service agreements, including those for foreign postal operators. Adopting the Postal Service's approach would make such identification on the MCS much more confusing and difficult to administer.

Finally, selecting a baseline agreement on a case-by-case basis on grounds that all agreements included within the MD FPO 1 product are functionally equivalent departs from the Commission's standard approach in Negotiated Service Agreement umbrella products, which is to designate one baseline agreement. The standard approach allows for repeated comparisons against a single benchmark, and the Commission finds this is the preferable approach.

However, the Commission finds that many of the benefits of the Postal Service's proposed approach can be obtained in a more narrowly tailored manner. To implement

this more narrowly tailored approach, the Commission clarifies that the two original agreements are baselines that can be used as alternatives in future MD FPO 1 functional equivalence comparisons, with selection of the baseline (as between Docket Nos. R2010-5 and R2010-6) in any given MD FPO 1 filing left to the option of the Postal Service. The similarities and differences of a new agreement would then be compared to the agreement the Postal Service identifies as the baseline in its comparison.

This approach recognizes that the MCS has long identified both agreements as baseline references; acknowledges the unique circumstances associated with the original inclusion of the two agreements within the MD FPO 1 product; and conforms the functional equivalence comparison in MD FPO 1 filings to the conventional approach for more narrowly-defined products.

As such, the Commission hereby adopts this more narrowly tailored approach and modifies ordering paragraph no. 7 in Order No. 1864 (and related text) consistent with the foregoing discussion.

*Other products with multiple MCS-designated baseline agreements.* The MCS also includes several other products with multiple designated baseline references.<sup>6</sup> To promote uniformity, the Postal Service shall employ the approach to the functional equivalence comparison described in this Order for MD FPO 1 filings (assuming such comparison is required). In the future, to avoid confusion, the Commission plans to discontinue the practice of designating more than one baseline reference. Should more than one agreement is presented as a potential baseline, one will be specified as the baseline for future functional equivalence comparisons.

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<sup>6</sup> See Global Plus 1C (baseline references: Docket Nos. CP2012-12 and CP2012-13); Global Plus 2C (baseline references: Docket Nos. CP2012-10 and CP2012-11); and Inbound Direct Entry Contracts with Foreign Postal Administrations (baseline references: Docket Nos. CP2008-14 and CP2008-15).

## VI. ORDERING PARAGRAPHS

*It is ordered:*

1. The Commission reopens Docket No. R2013-9 to address issues raised in the Motion for Partial Reconsideration of Order No. 1864, filed November 6, 2013.
2. The Commission modifies ordering paragraph no. 7 in Order No. 1864 and related text consistent with the discussion in the body of this Order.
3. The Commission designates, for purposes of functional equivalence comparisons in future market dominant FPO 1 filings, the agreements filed in Docket Nos. R2010-5 and R2010-6 as alternative baseline agreements, with selection of the baseline agreement in each filing at the option of the Postal Service.
4. For Negotiated Service Agreement umbrella product filings with multiple MCS-designated baseline references not covered by Ordering Paragraph No. 3, the Commission also designates, for purposes of functional equivalence comparisons, the multiple agreements as alternative baseline agreements, with the selection of the baseline agreement in each filing at the option of the Postal Service.

By the Commission.

Ruth Ann Abrams  
Acting Secretary